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## The EU's Unresolved Constitution

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## **The EU's Unresolved Constitution**

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**Abstract**

This paper examines the long evolution of the EU's unresolved constitution. Where the state is generally considered as a culturally prior, comprehensive, exclusive, monopolistic, singular, accomplished, determinate and settled political form and constitutional polity, the EU remains an accessory, partial, complementary, competitive, composite, incipient, indeterminate and disputed political form and constitutional polity. Over the last 15 years, as the relatively consensual law-centred focus of the EU's early and 'thin' constitutional settlement has come under increasing strain, the unresolved nature of the EU constitution has become more palpable. In this regard, the failed Big 'C' constitutional project has to be seen as the symptom of a continuing problem rather than as some kind of 'closure' event. The challenge to EU constitutionalism today is to stand above the various and divisive polity visions with which it is often and self-defeatingly associated in the name of an expressive commitment to the very idea of a European common good notwithstanding these different polity visions.

**Keywords**

law, constitutionalism, polity, unresolved, EU

## The EU's Unresolved Constitution

### 1. Introduction: Imagining the non-State Polity in Constitutional Terms

In the summer of 2007 the European Council announced its decision to “abandon” the “constitutional concept” it had endorsed so optimistically only four years previously on receiving a draft of a first Constitutional Treaty for the European Union (EU) from the Convention on the Future of Europe.<sup>1</sup> After the ‘no’ votes to the 2005 French and Dutch referendums on the (duly promulgated) Constitutional Treaty, and in recognition of the document’s dubious popularity and unratified status in various other member states, Europe’s leaders eventually opted to jettison the brave new world of a supranational Constitution and return to the more familiar international law vehicle of a “Reform Treaty.”<sup>2</sup> The move appeared to pay a political dividend. Agreement was reached as early as the Lisbon summit of December 2007 and, despite further delay occasioned by a fresh referendum defeat in Ireland, the new “postconstitutional Treaty”<sup>3</sup> was successfully implemented before the end of 2009.<sup>4</sup>

It is a striking irony of the ultimately fatal difficulties encountered by the Convention project that its trials coincided with the growing acceptance of some kind of constitutional status for the (EU)—even if understood in “small ‘c’” rather than documentary “big ‘C’” terms.<sup>5</sup> Yet this is more than coincidence. A written Constitution would not have figured on the European political agenda without a growing readiness to think and talk in constitutional terms about a process begun half a century earlier as an interwoven attempt at continental market-building and political rapprochement after the ravages of the Second World War.<sup>6</sup> And the extensive debate over the Constitutional Treaty that ensued certainly reinforced that trend, encouraging many interested in the EU—practitioners and commentators alike—to cast their appreciation of the EU’s development in constitutional language where previously they would have been indifferent or even hostile to such a characterization.

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1 German Presidency Conclusions: European Council, Brussels, 21-22 June 2007.

2 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 01.

3 Alexander Somek, “Postconstitutional Treaty”, (2007) 8 *German Law Journal* 1121-1132.

4 See e.g. Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (2010)

5 Neil Walker, Big “C” or Small “c”? (2006) 12 *European L.J.* 12-14 .

6 See e.g. Joseph Weiler *The Constitution of Europe* (1999) esp. ch.7.

The gradual adoption of a common terminology and a shared or overlapping narrative of constitutional origins do not, however, imply an emerging consensus about the contemporary constitutional quality or future constitutional potential of the EU. Rather, the constitutional turn has encompassed quite different and frequently opposing perspectives. That opposition was, of course, most apparent over the key strategic question itself—for or against an explicit constitutional settlement. But the big ‘C’ Constitutional debate engaged a deeper and wider diversity of perspectives between, within and, indeed, cutting across the immediate strategic alternatives.<sup>7</sup>

From the perspective of the big ‘C’ constitutional enthusiast, the (re)conceptualization of the new legal and political order as already amounting to an unwritten constitution supported a written Constitution on quite different grounds and to sharply divergent ends. The emergence of an unwritten constitution could be cited as a threshold of accomplishment that deserved formal recognition. On this view, a written constitutional settlement becomes appropriate either as a way of charting the progress or even according “finality”<sup>8</sup> to the distinctive constitutional achievement of the evolved supranational form or, more ambitiously, as a platform from which to build on the unwritten constitutional *acquis* toward a fuller form of constitutional maturity.<sup>9</sup> In marked contrast, the development of a supranational entity to a point where its powers could be claimed to be of constitutional weight and significance might, from a position wary of such expansion and minded to stress the continuing subordination of the EU to its member states, call for more formal constitutional recognition as a way of reining in and containing these powers.<sup>10</sup>

From the perspective of the big ‘C’ constitutional sceptic, too, endorsement of the unwritten constitutional credentials of the EU supported various narratives of development. To highlight the peculiar progress or achievement of the informal constitutional *acquis* might suggest that a self-styled written constitutional text, far from being timely, was in fact redundant. More specifically, to stress the organic development and complex richness of an

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7 For a fuller discussion of the various approaches brought to the Convention, see Neil Walker, “Europe’s Constitutional Momentum and the Search for Polity Legitimacy”, (2005) 3 *International Journal of Constitutional Law* 211-238. 225-31 (2005)

8 In the well-known formulation of Joschka Fischer, Foreign Minister of the Federal Republic of Germany, “From Confederacy to Federation—Thoughts on the finality of European integration”. Speech at the Humboldt University in Berlin on 12 May 2000. This speech is widely credited as a key moment in the mobilization of political opinion in favour of a big ‘C’ constitutional process.

9 See e.g. Jürgen Habermas, “Why Europe needs a Constitution” (2001) 11 *New Left Review* 5

10 See e.g. *The Economist*, Nov 4 2000. The conversion of the notoriously Euro-sceptic magazine to the case for a written Constitution was contingent upon such a limiting approach.

unprecedented supranational accommodation of legal and political forces might indicate the intrinsic difficulty, even inappropriateness, of any attempt to reduce that accommodation to a single self-contained documentary Constitution.<sup>11</sup> Or, in a more uncompromising variation of the sceptical theme, resort to constitutional language might serve to dramatize and accentuate the gap between those modest aspects of constitutionalism suited to the supranational domain and those grander aspirations and accomplishments familiar from the state tradition, so accentuating the deep incongruence—or “category error”<sup>12</sup>—of a fully-fledged written Constitution in this new domain.

The relationship between endorsement of the unwritten constitutional credentials of the EU and position-taking in the strategic context of the documentary constitutional debate, then, is complex, much dependent on the overall approach to the EU polity espoused or assumed. We may usefully re-plot this complexity, therefore, in terms of a spectrum of ambition encompassing three main polity visions. At the modest end of the spectrum, the EU polity assumes a truncated form, as something which in constitutional terms is measurable against but emphatically less than statehood. The EU as a polity-lite possessing only the more elementary features of statehood is seen either as attracting a constitutionalism-lite which does not merit the imprimatur of a written expression, or, if such a written form is contemplated, as it was by Euro-sceptic opinion during the heights of debate over the documentary constitution, it is so only to curb the state-like ambitions or tendencies of the supranational polity. In a complex middle ground, the EU is seen as a distinct and *sui generis* work-in-progress or achievement, one whose development and accompanying constitutional narrative clearly diverges from the state model. Again, this vision may or may not be deemed to be appropriately served by a written constitution, in this case depending upon whether one stresses its expressive value as a vindication of supranational distinctiveness or the excessive rigidity or irrelevance of its fixed form in the face of the moving picture of European integration. Finally, at the most ambitious end of the spectrum, the state again become the direct point of comparison, but no longer is viewed as a necessarily higher constitutional form than the EU. Rather, constitutionalization is seen as a foundation and point of departure for a fuller form of realization of the EU polity, if not *as* a state, at least as a meaningfully state-analogous entity in terms of certain key indices of polity formation and maturation; an

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11 See e.g. Joseph Weiler, “In defence of the status quo. Europe’s Constitutional *Sonderweg*”, in Joseph Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (2003); Stephen Weatherill, “Is constitutional finality feasible or desirable? On the case for European constitutionalism and a European Constitution” Conweb 7/2002.

12 See e.g. Andrew Moravcsik, “A Category Error” *Prospect* July 2005, 22-26.

ambition which, at least in the dominant modern constitutional tradition, has been seen to require a documentary expression.

We will return to these different polity visions—truncated and derivative polity, polity *sui generis* and mature polity—and how they might inform ongoing or renewed debate on Europe’s constitutional future in the concluding Section of this Chapter. The immediate point of these initial observations is simply to show how widespread and, simultaneously, how volatile the language of constitutionalism has become in today’s EU. Our main focus in what follows is upon the ‘raw material’ from which the various contemporary readings of Europe’s constitutional achievement and potential are drawn. We pose the baseline question of the very possibility of a constitutional law for the EU—a question that *all* positions in favour of a constitution, whether written or unwritten, are bound to answer affirmatively. Given the types of things that the idea of constitutional law tends to signify and, given where constitutional law is situated and how it is distributed across our global maps of legal meaning and authority, to what extent and in what ways is it possible to conceive of the EU as a suitable constitutional site? This inquiry requires us, first, to consider the EU against a general background of constitutional imagination and definition. In so doing, we explain why our understanding of the EU is much influenced by the historic centrality of the modern state to constitutional theory and practice, but also why, in these inescapable but incomplete terms, the EU is an *unresolved* constitutional entity. We then consider how the EU’s putatively constitutional features have in practice emerged and unfolded, in so doing focusing on the centrality of law to this process. And as this centrality has come under pressure in the mature EU, we consider, finally, the changing constitutional challenges and opportunities of this new species of post-state polity.

## 2. The Possibility of European Union Constitutional Law

A In the shadow of the state; the specific, the relational and the general

Within our contemporary conceptual maps of legal authority and meaning there are three different modes in which we recognize and according to which we situate constitutional law. Each mode figures in at least some understandings of the constitutional credentials of the EU. First, and still emphatically foremost, as indicated by the tenor of debate over a big ‘C’ Constitution, we typically view constitutional law as polity-specific. We comprehend



constitutional law as rooted in, peculiar to, concentrated upon and, most fundamentally, as in significant ways ‘constitutive’ and configurative of a particular polity or political community—as providing a unique regulatory frame that embraces and contains the whole polity. Today, however, the polity-specific perspective far from exhausts our understanding of constitutionalism. Where in the high modern age constitutional law was the primary law internal to states and international law was the dominant law between such mutually exclusive constitutional polities, that neat demarcation no longer holds. With the rise of non-state polities, including the EU itself, which overlap and intersect other polities, including state polities, as an outgrowth of the first polity-specific mode we increasingly also understand constitutional law in relational terms, as a nexus connecting different polities and their polity-specific systems of constitutional law. This altered institutional and constitutional landscape is part and parcel of the intensified wave of globalization or transnationalisation of the key circuits of social, economic and political power we have witnessed since the second half of the 20<sup>th</sup> century.<sup>13</sup> Thirdly, there is also a way of viewing constitutional law as polity-indifferent; neither as dedicated to a particular polity, nor even as located at the interface between particular polities, but as mobile between or otherwise recurrent across a wide range of polities. In this mode, which in a further feature of the globalizing trend has also become more salient in recent years, constitutional law, perhaps most prominently in the area of individual rights, may be perceived as a floating category of discrete or only loosely aggregated legal phenomena which have a universal or at least more general moral or practical resonance regardless of polity location.<sup>14</sup>

Common to all three modes of constitutional law is the heavy imprint of the modern state. This is most emphatically so of the first and dominant mode. The paradigm case of polity-specific constitutional law is the constitutional law of the state polity. The very *form* in which we view constitutional law in this mode, as something discrete and delimited, follows the model of the modern state. Equally, how we understand constitutional rules and mechanisms in this polity-specific form as typically co-designed or co-evolved in a holistic fashion—as the ‘joined-up’ normative patterning of political life—is exemplified by and largely sustained by the modern state tradition. Further, the detailed *content* of constitutional rules appropriate to the form of the discrete and joined-up polity are also much influenced by the long state tradition of usage and development. Constitutional law in relational mode, too,

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13 See e.g. A. Jones, *Globalization: Key Thinkers* (2010).

14 See e.g. Lorraine Weinrib, The Postwar Paradigm and American exceptionalism in S. Choudhry(ed) *The Migration of Constitutional Ideas* (2006) 84-105.

remains strongly under the influence of the state tradition, since the leading players remain the states themselves, and the constitutional pedigree and character of these state players will inevitably affect closely the terms of inter-polity relations. Finally, even where we consider constitutional law as non-polity-specific and non-holistic, but as a set of discrete and increasingly mobile rules, their meaning and migratory course remains conditioned by the various polity setting in which they are received and adapted, and the historically most significant and still most prominent such polity settings remain states.

## B The ambivalent legacy of state constitutionalism

The powerful legacy of state constitutionalism has decidedly mixed implications for the EU. Through the power of example the state tradition has encouraged and shaped the constitutional credentials of the EU more than it has any other non-state polity. The state tradition provides both a cue for recognizing and a template for developing the EU as a discrete and joined-up polity. In addition, as we shall see, much of the detailed content of the structures and doctrines of EU constitutional law is adapted from state constitutional law.

Yet the prominence of the statist heritage also challenges our understanding of the EU in constitutional terms. It does so both conceptually and practically. Conceptually, despite a strong family resemblance in some features, the EU is not a state. Although it may seek to develop functional equivalents, it lacks the crucial aspects of exclusivity of final authority, originality of collective agency and primacy of political identity associated with the mature constitutional character of the state, most emphatically in the high modern phase of the global system of states. Exclusivity of authority refers to the classical notion of state sovereignty. It holds that the state exhibits the one supreme ordering authority for a certain territorial polity—an authority that defers to no internal or external authority and to which all other authorities must defer. Originality of collective agency refers to the idea of such state sovereignty as the product of an irreducible *pouvoir constituant* or constituent power—a power residing in ‘the people’ conceived of as a non-derivative and unencumbered source. Primacy of political identity refers to a deep aspect of political culture—to the idea that the governing political persona of the subject is citizenship of the state polity, and that such citizenship announces the general associative bond through which particular political interests and beliefs are articulated and negotiated and other commitments and loyalties are circumscribed.

Practically, the key reason why the EU does not and cannot possess these statist features of authority, agency and identity, or at least cannot in the fullest sense associated with modern statehood, is precisely because it must exist alongside and in relation to states. While states themselves are undoubtedly challenged, altered and somewhat diluted in their constitutional character by the rise of non-state polities such as the EU in the late modern phase of globalization, they still in some measure continue to claim these scarce and competitive attributes for themselves.

To appreciate the EU in constitutional terms, therefore, we must look both *to* and *beyond* the template of the state. We look *to* the state for what the EU can adopt or adapt. As we have seen from the big ‘C’ constitutional debate, this is a sharply divisive move. It can be made more or less modestly, depending on the underlying polity vision held, and on the extent to which functional equivalents to the state’s mature constitutional aspects are considered feasible or desirable. And we must also be prepared to look *beyond* the state for those ‘constitutional’ features that are not based upon the state model and cannot be considered their functional equivalent. In so doing, let us concentrate on the first and, by extension, the second mode for thinking about the constitutional credentials of the EU, both of which are premised on the idea of constitutional law as a polity-specific practice, while remaining mindful of the third, polity-indifferent, way of thinking about constitutionalism.

### C Framing the Modern Constitutional Polity

The still dominant idea of constitutional law as polity-specific predates the modern state, even if the modern state has provided its (re)defining vehicle in recent centuries. Originating in the Latin verb *constituere* (to establish) and its associated noun *constitutio*, and in a cluster of similar predecessor notions in Ancient Greece, the concept of constitution was gradually extended from the natural world to the world of the ‘body politic’,<sup>15</sup> first of the classical republics and then through various fuller incarnations of the state. As already intimated, the term constitution implies a discrete and holistic entity as the framed object of ‘constitutional’ reference and contemplation. There are, two distinct aspects and two steps within this framing logic, and the movement from one to the other describes the emergence of modern constitutionalism. First, the mediaeval and early modern idea of constitution as an embracing descriptor of the inherited polity reflects a deepening assumption and spreading recognition

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<sup>15</sup> See e.g. Dieter Grimm, “The Constitution in the Process of Denationalization”, (2005)12 *Constellations* 447-463

that political society is appropriately situated and concentrated within certain stable and territorially-coded containers of social space. Secondly, and crucially, in the age of the modern state this idea gradually assumes a more constructive and a more progressive hue. The constitution is no longer simply an acknowledgement and expression of the established and embedded order of things within the “imagined”<sup>16</sup> setting of the bounded polity. Rather, it is now a constructive achievement. It is an active project of collective self-organisation, pursued in the interests—and eventually in the name—of that collective, of a polity conceived of as a community of free and equal persons. As such, it contains an enabling and a constraining element, concerned both to ensure the effective pursuit of the collective interests and to protect certain basic rights and freedoms of the free and equal individuals and groups who make up that community.<sup>17</sup>

The mechanics of this are complex. The new constructive constitution seeks, through various interlocking framing registers, to establish the wherewithal necessary to shape and sustain the imagined political community. What does the pattern of interlocking framing registers consist of? Basically, constitutional thought in the modern state tradition develops a set of distinctions but also a dense web of connections between a legal or *normative* framing register and other registers, which we may categorize as *political* and *socio-cultural*. The concentrated treatment of collective action problems and possibilities within any polity requires, in the first place, an appropriate normative blueprint. The normative register, in turn, divides into various sub-registers. There is a *formal* sub-register, consisting of the building blocks through which an autonomous and integrated legal system forms and equips itself with a normative capacity fit for modern constitutional purpose. There is also a *jurisdictional* sub-register, referring to the substantive scope of the legal order—the positive and negative means by which it specifies the boundaries of its competence. And there is, finally, an *integrative* sub-register, referring to how the formally connected bones of an expansively scoped legal system flesh out and cohere as an organic whole.

In the second place, the state constitutional order requires an authoritative assemblage of dedicated political institutions, itself generated or recognized by that normative order, as the complex of public power that acts upon, secures and further develops

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16 See e.g. Benedict Anderson, *Imagined Communities: reflections on the origins and spread of nationalism* (2006)

17 See e.g. Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 258-325.

that normative order.<sup>18</sup> We can again identify clear sub-registers within the *political* register. There is, on the one hand, the *institutional* sub-register, referring to the architecture of government itself—to the combination and organization of legislative, executive, judicial and administrative branches through which the normative order is activated and renewed. There is, on the other hand, the *authorizing* sub-register, referring to the expression and operationalization of the distinctively modern idea of the normative and institutional constitution as an artefact—as something shaped through collective human agency. It denotes the constituency by which and the way in which, in that constituency’s own terms, the constitutional order is initiated and constructed, or at least appropriated *as* an active constitutional order. This authorization may be a process or an event, informal or formal, elite or popular, but in the mature modern model of “foundational constitutionalism”<sup>19</sup> the institution of the constitutional order is typically conceived of as occurring through a formal episode of inclusive self-legislation—a popularly authorized project of documentary constitution-making. In the third place, there is a *socio-cultural* register. This requires an associative field—in its more developed forms variously called a society, a people, a community, a *demos*—as the cultural resource that energizes and sustains and is in turn fertilized by the mutually supportive legal and political orders.<sup>20</sup>

Because our sense of a modern constitutional order depends upon the interlocking combination of these framing registers, our threshold definition requires a minimum level of ‘activity’ within each field. There must be some basic evidence of expansive and integrating legal order and of a self-authorized rather than a merely inherited or imposed institutional apparatus, and there must be some level of broad cultural recognition and endorsement of the constitutional artefact. Beyond that threshold, we can distinguish between more or less intense achievements of constitutionalism as an active project of collective self-legislation. An autonomous legal order and dedicated architecture of political institutions provide the ‘thin’ essentials of any constitutional construction, including any candidate for constitutionalism beyond the state. A fuller set of links, involving a more significant investment in the expansive jurisdictional and integrative dimensions of the normative register, in the authorizing dimension of the political register and in the associative bonds

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18 See e.g. Niklas Luhmann, *Das Recht Der Gesellschaft* ( 1993).

19 Nico Krisch, *Beyond Constitutionalism: the pluralist structure of postnational law* (2010) ch.2

20 See e.g. Dieter Grimm, “Integration by Constitution” (2005) 3 *International Journal of Constitutional Law* 193-208.

available under the socio-cultural register, becomes necessary for a ‘thicker’ constitutional settlement.<sup>21</sup>

It is with reference to this fuller set of links that we comprehend the mature anatomy of state constitutionalism. The combination of fully developed legal, political and socio-cultural framing registers maps on to the three ‘peaks’ of exclusive final authority, original collective agency and primary political identity. In constitutional terms, exclusive final authority is a function of the interlocking of a formally autonomous legal order, a jurisdictional range unchallenged and unfettered by any other authority and a dedicated set of authoritative political institutions. Original collective agency is a function of an acknowledged act or process of self-authorization by which the constituent power generates these sovereign legal and political institutions or assumes ownership of them. Primacy of political identity depends upon a symbiosis of culture and of legal and political structure. It requires a sufficient sense of common political bond at the socio-cultural level to provide support for and sustained recognition of these sovereign legal and political institutions as duly self-authorized, including the act or process of self-authorization itself, which institutional accomplishment and event history may in turn reinforce the common bond of citizenship.<sup>22</sup>

#### D. Distinguishing EU constitutionalism; The Unresolved Constitution

Much analysis of the constitutional quality of the European Union polity follows the general track of this conventional approach. Such is the relative novelty of the subject at supranational level, indeed, that this literature often pays more attention to the basic idea of constitutional framing than is typically so in the more taken-for-granted world of state constitutionalism on which that conceptual structure is so closely modelled. Before examining the detailed trajectory of EU constitutional development in these terms, however, we should indicate the broad underlying differences between the EU and the state context. As already remarked, for all the discrete and holistic properties of the EU polity, it lacks those very traditionally state-defining features of exclusive final authority, original collective agency and primary political identity that provide the fullest articulation of the constitutional model of interlocking legal, political and socio-cultural frames available to us. Considered in

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21 See e.g. Miguel Maduro, “The Importance of Being Called a Constitution; Constitutional Authority and the Authority of Constitutionalism” (2005) 3 *International Journal of Constitutional Law* 332-356.

22 See e.g. Dieter Grimm “The Achievement of Constitutionalism and its Prospects in a Changed World” in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010) 3-22.

the terms dictated by the statist template, then, the EU has operated at the ‘thinner’ end of the spectrum of constitutional development. Yet the absence of certain statist features is also a space of constitutional possibility. The EU increasingly utilizes many of the tools and much of the vocabulary of constitutionalism in ways that explore new and often contested horizons of political meaning and authority and which employ or imply alternative polity visions. There is, in short, something open-ended and fundamentally *unresolved* about the EU’s constitutional formation, and this is demonstrated in a number of more specific elements of absence, openness or special development.

First, there is the basic matter of the more restricted depth and breadth of the polity horizon. The intensity achievable through the high modern state in terms of its three peaks of sovereignty, constituent power and citizenship implies a claim to be source and container of collective action for a political community which is only self-limiting in its jurisdictional reach, asserts comprehensive normative capacity to deliver within that range, and provides the primary frame of reference for its members. This is reflected in the closely self-referential character of the state’s constitutional posture—in its self-orientation as a comprehensively self-sufficient and culturally prior form of political organization. In comparison, the EU possesses both a narrower competence and a less comprehensive normative capacity within that narrower competence, as well as a supplementary status in terms of political identity. That is to say, it invokes a jurisdiction that is only *partial* both in scope and in effective capacity and it involves a way of political being that is culturally secondary and *accessory* to that of state citizenship.

This more restricted and more crowded horizon, in turn, has implications for how the EU relates to other polities. Whereas the only self-limiting state polity treats other polities either as mere delegates or as its (mutually exclusive) fully sovereign counterparts, the partial EU polity is also perforce a polity whose jurisdiction and capacity may, from one perspective, overlap the boundaries of other polities, and, from another even more fluid perspective, represent the ‘crowded space’ or point of intersection of various different polities. These two perspectives upon the situation and spatialisation of the EU polity—‘inside-out’ boundary overlap and ‘outside-in’ interlocking—indicate three further distinguishing features of the EU as an unresolved constitutional polity. The first perspective accounts for two contrasting features of the EU’s open and overlapping boundaries. On the one hand, as a limited polity in terms of scope and capacity, the EU’s orientation towards states and other polities is often that of a collaborative and *complementary* polity, seeking

through a complex of inter-systemic normative “bridging mechanisms”<sup>23</sup> to co-ordinate its objectives and its means for realizing its objectives with these other polities. On the other hand, the shift from self-reference to external reference also has a negative connotation, and again the contrast with the system of states is marked. The exclusively empowered and self-sufficient state treats its authority, and the authority of other exclusively empowered and self-sufficient states, in monopolistic terms. For its part, given its extensive overlap with other polities, primarily state polities, alongside and in tension with its collaborative approach to these other polities, the EU also finds itself in a *competitive* relationship with these same polities over their respective domains of authority.

The situation is further complicated by the third relational dimension of the EU polity, where the logic of polity interpenetration is taken a stage further and the environment of polity diversity is understood not just to affect the margins of the EU polity but to shape its very internal composition. Whereas the comprehensively and exclusively authorized state polity necessarily possesses structural integrity or singularity, in which not just all normative elements but also all institutional parts contribute to and are resolved in terms of one and the same polity whole (even if their initial point of reference may be different territorial, ethnic or functional parts), the EU may instead be viewed as a *composite* entity. It is a hybrid—a “mixed”<sup>24</sup> or “compound”<sup>25</sup> structure—which in its different institutions (Council, European Council, Commission, Parliament, Court) and normative emphases reflects and interlocks its differently polity-sourced parts.

Alongside these three spatial features of the constitutional particularity of the EU there are two distinguishing temporal features. Although their resilience is highly variable<sup>26</sup> and their causal sequence of development can vary dramatically—from the United States model in which the self-authorizing constitutional instrument predates the cultural construction of ‘national’ community and the political architecture of the state to various European continental models where either or both ‘state’ and ‘nation’ predate the explicitly constitutional project<sup>27</sup>—we encounter and contemplate the vast majority of enduring state constitutions as achieved states of affairs. We typically confront them as always/already

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23 Steve Weatherill, *Law and Integration in the European Union* (1995) chs 4- 5.

24 See e.g. Giandomenico Majone, “Delegation of Regulatory Powers in a Mixed Polity” (2002) 8 *European Law Journal* 319; N MacCormick *Questioning Sovereignty* (1999) ch. 9.

25 S. Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (2007).

26 See e.g. Zachary Elkins, Tom Ginsburg, James Melton, *The Endurance of National Constitutions* (2009).

27 See M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (2010) chs 5-7.



‘thickly’ accomplished projects whose dynamic is one of consolidation or adaptation. This is not the case with the EU. Whether or not its future development is envisaged in state-analogous terms, the EU today remains a constitutional work in progress—an *incipient* structure still self-consciously under construction rather than a fully realized form. Moreover, and closely related, the EU’s unresolved condition is not just empirical but also conceptual. Whereas the completeness of the state constitutional model presupposes a recognizable template for its mature form, and so a determinacy and finality of conception, the incompleteness of the EU in these state-centred terms and its irreducibility to these state-centred terms suggests the absence of any such settled model of its mature form—an *indeterminacy* and open-endedness of conception.

A final distinctive characteristic of EU constitutionalism flows from the previous features. The state constitutional polity, on the one hand, is a settled political form. Such is its embeddedness, self-sufficiency, self-containment and structural unity, its typical manifestation as an already accomplished state and conformity to a familiar template, that neither its basic eligibility as a constitutional polity nor the general terms on which that eligibility depends are the subject of serious contestation. That does not mean that the basic status *qua* constitutional state claimed on behalf of a polity will not be challenged. Either the very identity of the state or, more commonly, its satisfaction of basic constitutional standards may be contested, both externally and internally. But however sharply engaged, the contest remains one about specific cases rather than the general type. The constitutional polity of the EU, on the other hand, is a constitutionally *disputed* polity. In light of its limited jurisdiction, its secondary form of political identity and agency, its open and unsettled relationship with states and other polities, its hybrid structure, its still emergent status and provisional conception, both its basic eligibility as a constitutional polity and the terms on which that eligibility rest are subject to serious and continuing contestation.

In a nutshell, whereas the state has generally been considered as a culturally prior, comprehensive, exclusive, monopolistic, singular, accomplished, determinate and settled political form and constitutional polity, the EU remains an accessory, partial, complementary, competitive, composite, incipient, indeterminate and disputed political form and constitutional polity.

### **3. The Trajectory of EU Constitutionalism**

Let us cash out this preliminary conceptual analysis through an examination of the evolving terms of the EU's unresolved constitutionalism. In so doing, we focus on these predominantly legal sub-registers within which emerged, largely unheralded in these terms at the time, what has subsequently been consecrated as the 'thin' version of EU constitutionalism. Having described that achievement, we will consider its strengths and limitation, and why it has come under increased scrutiny and pressure in the lead-up to the big 'C' Constitutional project.

#### A. The element of 'thin' constitutionalism

##### (i) *The formal sub-register*

The birth of small 'c' constitutionalism in the EU context is closely associated with the elaboration of the *formal* sub-register of legal order. As noted earlier, this involves a cluster of interconnected features that supply the basic structure of a self-standing legal system.. Self-ordering refers to the capacity of a legal system to reach and regulate all matters within its domain, typically through its successful embedding of certain law-making 'secondary' norms as a means to generate and validate a comprehensive body of 'primary' norms of conduct,<sup>28</sup> which norms may themselves may be further distinguished as higher or lower, more or less binding and entrenched. Self-interpretation refers to the capacity of some organ(s) internal to the legal order, typically located in the adjudicative branch, to have the final word as regards the meaning and purpose of its own norms. Self-extension refers to the capacity of a legal system to determine the extent of its own jurisdiction—sometimes known as *Kompetenz-Kompetenz*. Self-amendment refers to the existence of a mechanism for changing the content of the legal order that is provided for in terms of that order and empowers organs internal to that order as the agents of the amendment process. Self-enforcement refers to the capacity of the legal order, through the development of a body of procedural law and associated sanctions, to secure the application and implementation of its own norms.

Finally, the quality of self-discipline depends on the platform established by these other features. When the legal order reaches a certain threshold of coverage and constancy in its production of primary norms (self-ordering), when it attains a certain threshold of effectiveness in its rules of standing, justiciability and liability (self-enforcement), when it

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28 H. L.A. Hart, *The Concept of Law* (2nd ed., 1997 ) ch.5

acquires some capacity to adjust or refine its own normative structure, and provided it can guard against external influences undermining these system-building endeavours (self-amendment, self-interpretation and self-extension), it is then in a formal position (though far from guaranteed) to satisfy two related aspects of self-discipline. First, it can offer a level of generality and predictability of treatment of those subject to its norms, so helping to promote and vindicate a system-constraining cultural presumption against arbitrary rule. Secondly, and more specifically, the consolidation of a legal order with mature claims to autonomy, comprehensive coverage and effectiveness provides the opportunity and cultivates the expectation that even the institutional or governmental actors internal to the legal order should not escape the discipline of legal restraint in accordance with that mature order. These two core ideas—of the ‘rule of law, not man’ and of a ‘government limited by law’,<sup>29</sup>—provide a key element of all Western legal traditions, whether couched in the language of ‘rule of law’, *état de droit* or *Rechtsstaat*, and supply a cornerstone of constitutionalism understood as a discourse not just of legal authority but also of legal virtue.<sup>30</sup>

From its inception in the three founding Treaties of the 1950s,<sup>31</sup> the EU legal order, through a mix of legislative provision and judicial assertion, boasted many of the formal features of a self-standing legal order. Its development, however, has also been conditioned by its ‘spatial’ situation as an overlapping polity in a relationship of mutual dependence and competition with state polities. The EU both invites and depends upon the cooperation and is vulnerable to the self-assertion of other legal orders within a broader ‘pluralist’ configuration,<sup>32</sup> and so its formal autonomy is coloured and modified both by collaborative openness and of boundary rivalry.

In terms of self-ordering and self-interpretation the EU legal order comes closest to a fully self-contained system. Its founding Treaties provides the EU’s own internal hierarchy of normative instruments—Treaty provisions, directives, regulations and decisions,<sup>33</sup> and this framework has been progressively adjusted and rationalized over subsequent Treaties.<sup>34</sup> For its part, from its pivotal early assertion of the ‘supremacy’ or ‘primacy’ of its norms in

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29 See e.g. Brian Tamanaha, *On The Rule of Law* (2004) ch.9.

30 See e.g. Neil Walker, “Opening or Closure? The Constitutional Intimations of the ECJ”, in Miguel Maduro and Loïc Azoulay (eds.) *The Past and Future of EU Law* (2010) 333-342.

31 The European Coal and Steel Community of 1951, the Euratom Treaty of 1957, and most importantly, the European Economic Community Treaty of the same year.

32 The literature on so-called constitutional pluralism in the EU is now extensive. For an excellent overview, see Monica Claes, *The National Courts’ Mandate in the European Constitution* (2006)

33 Art. 189 EEC.

34 See now, Art. 249 Treaty on the Functioning of the European Union (TFEU).

general over the norms of other legal systems,<sup>35</sup> the European Court of Justice (ECJ) has long ensured that, from the internal perspective of the EU legal order at least, that hierarchy prevails over the competing ordering claims of other legal systems. This and other early acts of self-assertion in the formative years of its jurisprudence helped the ECJ to consolidate its position, suggested but not determined by the framework provisions of the Treaties, as a ‘Supreme Court’ for the EU, and so as its final interpretive authority.<sup>36</sup> But even in these areas of greatest strength, supranational authority is qualified at the margins. Dependence upon national instruments for implementation of EU legislative measures other than regulations curtails the self-ordering chain of validity. Additionally, as the ECJ’s main jurisdiction is by means of preliminary reference to obtain authoritative resolution of questions as to the interpretation or validity of EU law,<sup>37</sup> and so within the referring gift and subject to the disposal of the domestic referring court, it is not a final appellate court. It lacks the capacity to have the last word, including the very means to ‘decide what to decide’.

While still well developed in comparison to other transnational regimes, other aspects of the formal autonomy of the EU are more significantly qualified. As regards self-extension, through the doctrine of implied powers and an expansive reading of its own ‘necessary and proper’ clause,<sup>38</sup> the ECJ court makes serious claim to determine the range of its own competence. In the final analysis, however, this is limited by the EU’s dependence upon (textually) conferred powers.<sup>39</sup> It is also counterbalanced by the preparedness of the domestic courts of Germany, Spain, Denmark, Poland, the Czech Republic and elsewhere<sup>40</sup> to (re)assert national constitutional authority from time to time against what they see as the actual or potential overreach of the European legal order. This claimed overreach may involve Treaty powers which encroach too far on core and traditional areas of state sovereignty,<sup>41</sup> or it may involve supranational legislative acts or executive powers deemed to interfere with fundamental rights<sup>42</sup> or other national constitutional protections.<sup>43</sup> In any event,

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35 *Costa v ENEL* [1964] ECR 585.

36 See e.g. Alec Stone Sweet, *The Judicial Construction of Europe* (2004).

37 Art. 267 TFEU

38 Art. 352 TFEU.

39 Art. 5 TEU.

40 See e.g. J. Baquero Cruz, “The Legacy of the Maastricht-Urteil and the Pluralist Movement” (2008) 14 *European Law Journal* 389; W. Sadurski “Solange Chapter 3; Constitutional Courts in Central Europe—democracy—European Union” (2008) 14 *European Law Journal* 1-35.

41 Often in the context of Treaty reform, as in the German Constitutional Court’s famous judgments on the legality of the Maastricht and Lisbon Treaties; See e.g. *Brunner v. European Union Treaty* [1994] 1 CMLR 57; Judgment of 30 June 2009 (2 BvE 2 / 08, 5 / 08; 2 BvR 1010 / 08, 1022 / 08, 1259 / 08, 182 / 09).

42 See e.g. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540

the fact or prospect of such reactions may invite a more prudent approach by the judicial and other branches of the EU when addressing the range and limits of their jurisdictional ambition.<sup>44</sup>

Outside the generous limits of self-interpretation, the power of constitutional self-amendment, strictly construed, remains lacking. Instead, the EU legal order relies upon a mechanism external to its own institutional edifice—namely the Intergovernmental Conference—for formal Treaty amendment. In a significant concession, however, recent Treaties have introduced simplified and less onerous non-Treaty based procedures for the revision of some of their own terms.<sup>45</sup> In the area of self-enforceability, a key element has been the doctrine of the ‘direct effect’ of EU norms in national legal orders, which developed and continues to operate in close tandem with the primacy doctrine.<sup>46</sup> Yet even within the limited set of those supranational rules considered sufficiently clear, precise and unconditional to be domestically justiciable, the co-operation of national judges is patently necessary for enforcement. And beyond this, the EU legal order depends upon national authorities both for the legislative transposition and for the executive and (again) judicial application of non-directly effective norms, although the gradual expansion by the ECJ of the doctrine of state liability<sup>47</sup> as a way of plugging the gaps in this system has been a selectively effective sanction against non-compliance.

Finally, self-discipline presents another picture of significant yet incomplete authority. The idea of the ‘rule of law’ applying comprehensively to the institutions of the EU itself, was elevated to *the* litmus test and standard of constitutionality by the ECJ when it coined the small ‘c’ word in *Les Verts*<sup>48</sup> to justify the non-Treaty addition of the Parliament to the list of bodies subject to judicial review. However, the ambition of comprehensive internal legal oversight has remained vulnerable to the non-justiciability or limited justiciability of certain areas of EU law, notably, despite recent improvements, in the newer, non-core domains of the Area of Freedom, Security and Justice and the Common Foreign and Security Policy.<sup>49</sup>

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43 See e.g. the recent cluster of cases challenging the constitutionality of the European Arrest Warrant, discussed in Cruz, n40 above.

44 See, Weiler n6 above, 320 (discussing the relevance of the logic of Mutually Assured Destruction)

45 Art.48(6-7) TEU.

46 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

47 See e.g. Case C-224/01 *Kobler v Austria* [2003] ECR I-10239.

48 Case 294/83 *Parti Ecologiste ('Les Verts') v. European Parliament* [ [1986] ECR 1339; [1987] 2 CMLR 343; For discussion, see Walker, n30 above.

49 Arts. 275-76 TFEU.

(ii) *The jurisdictional sub-register*

The other normative sub-registers have gradually built on the platform of formal autonomy. Jurisdiction has assumed a highly distinctive shape in the EU. In the state constitutional context the jurisdictional sub-register closely reflects and tracks the defining modern constitutional idea of a broad division between a collectively-enabling public sphere of comprehensive policy capacity and a collectively-constraining protected sphere of private autonomy. Typically, we find a combination of positive and negative norms—of prescription and proscription. On the one hand, there is a functionally unlimited legislative and executive jurisdiction in pursuit of the common good, while on the other, that jurisdiction is curtailed and circumscribed by a set of individual-centred ‘forbearance’ rights or basic freedoms.

In the EU, both collective competence and individual freedoms have been treated differently, as has the relationship between them. Collective competence is not functionally unlimited. What is more, it is a competence that is defined not *against* but *in terms of* the ‘functional’ pursuit of a particular sub-set of individual freedoms, namely the so-called ‘four freedoms’ of movement of goods, services, capital and persons necessary to secure a common transnational market. The common good and individual freedom, therefore, are treated not as distinct, sometimes divergent and mutually balancing ends but as indistinct and convergent, if self-limiting objectives. And reflecting the new relational openness of the EU polity context, the constraining edge of this jurisdiction is for the most part externally directed, towards the member states in the form of prohibitions upon the maintenance or introduction of national measures constituting barriers to trade, creating other obstacles to free and undistorted competition,<sup>50</sup> or impeding the free movement of persons, services and capital.<sup>51</sup> For the “market-making” pursuit of the four freedoms by the EU is largely through the method commonly known as “negative integration”,<sup>52</sup> with the ECJ and the Commission enabling *through* constraining—by means of specifying and policing the permissive boundaries of the market against state encroachment.

If this paints a jurisdictional picture sharply at odds with the state constitutional model, other developments have begun to suggest a more familiar pattern. First, the functional jurisdiction of the EU has also gradually come to be pursued through “positive integration”, namely the elaboration by legislative and other measures of a system of

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<sup>50</sup> Arts. 26, 34-37 TFEU.

<sup>51</sup> Arts. 45, 49 and 56 TFEU.

<sup>52</sup> Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (1999) 45

regulation at the level of the larger supranational unit.<sup>53</sup> To some extent, this has remained concerned with market-making—for example, the harmonization of divergent national product standards. In addition, however, and accelerating from the time of the Single European Act (1987) and the Treaty of Maastricht (1992), the increase in positive integration tracks the expansion of EU jurisdiction beyond the four freedoms into various “market-correcting” provisions of social and environmental regulation as well as other flanking measures, primarily in internal and external security, which owe little to the economic rationale of integration and more to other kinds of collective policy capacity associated with the state.<sup>54</sup> The reasons for this and its significant implications for the stability of the ‘thin’ constitutional settlement are considered further below.<sup>55</sup>

A second and more recent state-like jurisdictional development addresses the other side of the coin. It concerns the informal adoption in 2000 and eventual Treaty recognition of the wide-ranging Charter of Fundamental Rights.<sup>56</sup> Applicable against both member states and the EU’s own institutions and other bodies, this initiative, in pursuing the idea of a general constitutional protection of private autonomy, has meant that, on the proscriptive as well as the prescriptive side, EU jurisdiction more closely approximates the domestic model.

### (iii) *The integrative sub-register*

The integrative sub-register provides the most explicit example within the supranational normative register of direct borrowing from the domestic constitutional heritage. At issue here is how the mix of European law becomes gradually thickened to fill in the gaps left by the purely mechanical coherence of the formal model. Through the idea of general principles which, initially in the case law, and now in the Treaties, are deemed to derive from the ‘common constitutional traditions’ of the member states, the ECJ has equipped itself with a number of non-textual lodestars—fundamental rights, equality, proportionality, legal certainty, effectiveness etc.<sup>57</sup> In a “synthetic”<sup>58</sup> process, these ideas, while their national origins are never disowned, are gradually refined so as to acquire distinct significance as doctrines of supranational law. In this way, the EU legal order seeks to garner the normative resources necessary to address hard questions raised by its gradually-expanding jurisdiction;

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<sup>53</sup> *Ibid.*

<sup>54</sup> See e.g. Weiler n6 above, ch.2.

<sup>55</sup> See Section 3B .

<sup>56</sup> Art. 6(1) TEU, as amended by the Treaty of Lisbon.

<sup>57</sup> See e.g., T. Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> ed., 2006).

<sup>58</sup> John Erik Fossum and Agustin Jose Menendez, *The Constitution’s Gift: A Constitutional Theory for a Democratic European Union* (2011) esp. Ch.2.

both the need to construe new areas of law for which there are no existing thick interpretive practices and the imperative to do so in a manner that strives for internal consistency and coherence across an increasingly wide range of functional objectives and core values.<sup>59</sup> As with the jurisdictional sub-register, the dynamic of constitutionalism in this sub-register is incremental, mapping a gradual movement away from the ‘thin’ end of the constitutional spectrum.

(iv) *The institutional register*

Patently, the EU from the outset has boasted its own specialized and closely defined institutional structure as both product and mobilizing force of its legal order. In particular, through a dedicated Court (ECJ) administrative college (Commission) and legislator (Council), the founding scheme supplied a more elaborately differentiated and strongly empowered institutional complex than possessed by other international Treaty organizations.<sup>60</sup> What is more, in terms of the range and depth of institutions and the density of their relations, today the EU’s political system has evolved and matured far beyond that early structure. Yet we should be wary of overstating similarities between the supranational and the state architecture. To recall our earlier discussion, it is in this institutional sub-register that the distinctiveness of EU as a mixed or composite polity becomes evident. Whereas the primary axis of institutional division within the state polity is the governmental branch and function—legislative, executive or judicial—for one and the same polity object, the EU system has no such single centre of gravity. Its key axis of institutional division, instead, is the representation, in functionally overlapping form, of separate ‘estates’<sup>61</sup> and interests, which constituencies refer back to diverse polity sources, or at least, diverse conception of the Euro-polity. Traditionally, the European Commission and the European Court of Justice reflect the supranational interest, the ‘intergovernmental’ Council and the European Council (of Heads of States) refer back to the separate interests of the state polities, while the European Parliament refers, ambiguously, to the representation of the European ‘peoples’ (national) or ‘people’ (supranational). Rather than the separation of (types of governmental)

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59 See e.g. K. Laenerts and J. Gutierrez-Fonz, “The Constitutional Allocation of Powers and General Principles of EU Law”(2010) 47 CMLR 1629-1669

60 See e.g. Paul Craig, “Institutions, Powers and Institutional Balance” in P. Craig and G. De Burca (eds) *The Evolution of EU Law* (2<sup>nd</sup> ed., 2011) 41-84.

61 See Majone, note 24 above.



powers, therefore, the key structural imperative of the mixed constitutional polity is more closely modelled on a dispersed, pre- state conception of institutional balance.<sup>62</sup>

Just because of the background diversity of interests, however, that balance has tended to be a contested one, and also increasingly complex. The initial technocratic disposition in pursuit of the common market—‘the Commission proposes, the Council disposes’—lasted only until the shift under the transitional provisions of the initial Treaty from unanimity to qualified majority voting in the Council threatened the retention of ultimate national control over the legislative process. This led to the so-called ‘empty chair’ crisis in the Council, provoked by French President de Gaulle and only resolved by the 1966 Luxembourg Compromise, which provided that decisional unanimity would continue where important national interests were at stake. This led to a long consolidation of national executive hegemony over new macro-policy initiatives, reflected in the gradually increasing prominence of the European Council<sup>63</sup> and in an extended period of legislative immobility not overcome until a series of Treaty initiatives beginning with the Single European Act (1987) and continuing with the Treaties of Maastricht (1992) and Amsterdam (1997). These measures relaxed the national veto by introducing qualified majority voting in the Council, first in the area of internal market law and then more broadly. At the same time, direct national executive influence was further diluted by the increasing recognition of the European Parliament as a third proactive player in the legislative process, first through the cooperation procedure and then through the stronger co-decision procedure.

The easing of legislative deadlock and the emerging policy-making tripartitism, however, far from resolves all questions of institutional balance. One regular battleground of the last two decades has been the compositional and internal decision-making rules of the key institutional players. Another has been the division of ‘sub-legislative’ executive and regulatory authority between Commission and Council in more detailed areas of policy. In both arenas, the tensions of a composite polity remain vividly present.<sup>64</sup>

## B. The Strengths and Limitation of Thin Constitutionalism

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<sup>62</sup> See Craig, note 60 above.

<sup>63</sup> Despite having been informally established at the Paris summit of 1974, it was not accorded Treaty recognition until the Single European Act of 1987.

<sup>64</sup> See Craig, note 60 above; see also G De Burca and J. Scott (eds) *Law and New Governance in the European Union and the United States* (2006); Christian Joerges and Jurgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology” (1997) 3 *European Law Journal*, 273–299.

## (i) the centrality of law

Understandings of the manner in which the ingredients of thin constitutionalism—formal, jurisdictional, integrative and political-institutional—combine, vary in emphasis, but all versions of the “grand narrative”<sup>65</sup> have in common the idea of law performing a vital and well-tailored role in the construction and sustenance of the EU polity. The centrality of law to the emergent constitutional settlement rests on a number of considerations—instrumental, structural, ideological, anthropological and, most fundamentally, philosophical. Let us look briefly at each.

The instrumental dimension concerns the indispensability of law as the basic motor of supranationalism—the key means to the end of European integration. Writing in the early 1980s, before the gradual development of qualified majority voting and the pronounced expansion of jurisdiction beyond the market-making core, Joseph Weiler drew attention to the “the dual character of supranationalism”<sup>66</sup> as the defining frame of Europe’s early evolution. At that stage, the developed character of legal or normative supranationalism in the core area of the internal market, particularly the ECJ’s assertive development of the formal properties of the EU as an autonomous legal system, stood in stark contrast to a modestly conceived decisional or political supranationalism. Yet the two were strategically related. The early prominence of legal supranationalism occurred not in spite of political underdevelopment but precisely *because* political supranationalism remained so modest, with the member states retaining a *de jure* or *de facto* veto power in most areas of European policy-making. The most basic key to the attractiveness of law as the vehicle of supranational agency, therefore, lay with its regulatory capacity to steer, to consolidate and, typically through judicial recognition of the claims of private litigants, to guarantee positive-sum intergovernmental bargains across wide-ranging aspects of economic integration and some more limited aspects of market-correcting regulation, and to do so without threatening key national political prerogatives. The law’s instrumental value was twofold. It provided a legible and stable method of charting and co-coordinating the supranational settlement. Additionally, in a context of market-making where the temptation for each national member of the continental trade-liberalizing cartel to engage in protectionism and other forms of discrimination while exploiting the general opening of the markets of the other national

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65 Alec Stone Sweet, “The European Court of Justice” in Craig and De Burca (eds) *The Evolution of EU Law* 121-153, 132.

66 Joseph Weiler “The Community System: The Dual Character of Supranationalism” (1981) *Yearbook of European Law* 267.

members posed a significant collective action problem, the consistent application and enforcement of the rules of the game by independent legal institutions was crucial in forestalling free-riding and rendering common commitments more credible.<sup>67</sup>

Structural factors reinforce the instrumental attractiveness of law. The empowerment of the ECJ as the apex court responded to a conception of the constitutional settlement understood, in the language of organizational economics, as an incomplete contract. Framework texts, even the relatively detailed codes of successive European Treaties, always allow a degree of open texture. In so doing they both lower the bar of prerequisite consensus and, by facilitating agreement at the drafting stage, allow judicial adaptation of the text to changing conditions without new resort to the drawing board. The resulting margin of judicial manoeuvre is key to reconciling stability and flexibility in any constitutional context; all the more so in the EU, where the political conditions for regular textual reform, certainly over the first quarter century of the Union, were highly unfavourable. The ECJ, then, became a vital mechanism to avoid blockages and conflicts associated with the divergence and conflict of national political interests. As a “trustee court”,<sup>68</sup> delegated significant power to bind its national principals and able through development of its formal constitutional attributes to fortify and expand its zone of discretion, it could approach the task of ‘completing’ the supranational contract both by advancing the material agenda of integration case-by-case and by adjusting the balance, so sensitive in the mixed polity context, in boundary conflicts over the powers of the diversely-sourced institutions.<sup>69</sup>

The fiduciary role of a trustee court, however, is not legitimated solely through considerations of system functionality. Ideological factors also matter. The tradition of legal formalism, assiduously cultivated in the context of an ECJ composed of senior jurists from all member states and conducting its business in a typically laconic and scrupulously non-partisan ‘legalese’, has lent cumulative authority to the court’s decision-making.<sup>70</sup> The fact that much of the constitutional jurisdiction of the EU and its judicial organs could be articulated in terms of rights—both its positive jurisdiction, and, with increasing emphasis, its negative jurisdiction, has reinforced this ideological advantage. It has meant that the ECJ could engage in a constitutional vein in terms closely associated with its own authority as a

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67 See e.g., Martin Shapiro, “The European Court of Justice, in P. Craig and G. De Burca, *The Evolution of EU Law* (1<sup>st</sup> ed., 1999) 321.

68 See Stone Sweet, note 36 above.

69 See e.g. Shapiro, note 67 above, 321-22.

70 See e.g. Weiler note 6 above, ch.5.

court—in the language of individual rights and remedies so familiar from the historical lexicon of constitutional law.<sup>71</sup>

Underpinning these instrumental, structural and ideological considerations, there is a strong cultural dimension. A recent body of anthropological research has underlined just how important the original network of elite supranational actors in and around the ECJ was in developing the theme of “Europeanization through case-law”.<sup>72</sup> Not only did the key formative decisions on supremacy and direct effect take place in acknowledgment of and response to the difficulties associated with political integration, but they involved a conscious and self-reinforcing mobilization of the very notion of the supranational community as a community of *law*. Rather than thinking of law-centred theories of integration as purely external and retrospective accounts of a secular process, therefore, we should also understand them as active structuring devices, as means by which judges, civil servants, academics, MEPS, national diplomats and Commissioners became engaged ‘in real time’ in a “circular circulation of ideas”<sup>73</sup> which contributed in a cumulative manner to the ascendancy of legal constitutionalism.

If the assertion of such a robust legal persona has been the key to the capacity of the EU operating from its narrow stronghold of institutional power to exercise continental regulatory authority, its success at root depends upon its resonance with many of the earlier philosophical justifications of the EU. In their different ways, two of the most influential of the early grand theories of integration, the German ordoliberal tradition<sup>74</sup> and Hans Ipsen’s idea of the EU as a special purpose association,<sup>75</sup> encouraged a law-centred perspective. For the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market-enhancing system of rights whose legitimacy *required* the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter best left instead to the member states—and even there only insofar as compatible with the bedrock economic

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71 See e.g., Stone Sweet, n65 above; Fritz Scharpf, “Legitimacy in the Multilevel European Polity” in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism?* 89-119.

72 See e.g. A. Vauchez, “The Transnational politics of judicialization *Van Gend en Loos* and the making of EU polity” (2010) 16 *European Law Journal* 1-28, 2.

73 *Ibid.* 22

74 See e.g. E-J Mestmacker, “On the Legitimacy of European Law” (1994) *RechtsZ* 615; see also D. Chalmers, “The Single Market: From Prima Donna to Journeyman” in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* 55-72. On the continuities between the legal and political thought of the Weimar Republic and post-war thinking about supranationalism more generally, see C. Joerges and N.S. Gheorghiu (eds) *Darker Legacies of Law in Europe* (2003).

75 H-P. Ipsen, “europäische Verfassung—Nationale Verfassung” (1987) *EuR* 195.

constitution. Ordoliberal theory, then, provides a classic model of how an autonomous legal order, through generating and ring-fencing a framework of economic exchange centred on the four freedoms, provides a platform for the efficient operation of a capitalist economic logic

. Ipsen's theory, to which Giandomenico Majone's contemporary work on the idea of a European "regulatory state"<sup>76</sup> is a notable successor, shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the ambit of law is extended so that the invisible hand of the market is supplemented by the expert hand of the technocrat. In Majone's elaborately developed conception—one that has continued to capture the sensibility of a significant part of the Brussels elite—these additional regulatory measures are concerned not with macro-politically sensitive questions of distribution, but with risk-regulation in matters such as product and environmental standards where expert knowledge is deemed paramount, and where accountability, it is argued, is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions.

#### (ii) The exhaustion of the legal paradigm

The delicate balance achieved by locking the EU's collective agency within a law-centred discourse and a narrow market-based justification could not, however, hold indefinitely. The pursuit and perfection of the narrow economic objectives of the Union has progressively impinged upon a wide range of social issues, making "spillover"<sup>77</sup> into politically contentious areas of traditionally national jurisdiction inevitable. Both ordoliberal and regulatory state approaches, in consequence, have become increasingly vulnerable to the charge of drawing artificial distinctions between technical questions of market-making and standard-setting and deeply contested questions of value preference and transnational resource and risk allocation.<sup>78</sup>

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76 Giandomenico Majone, "The Rise of the Regulatory State in Europe" (1994) 17 *West European Politics* 77-101; *Europe as the Would-be World Power: The EU at Fifty* (2009); On the connections between Ipsen and Majone, see C. Joerges "'Good Governance' in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann" EUI Working Papers, RSC No. 2001/29.

77 See e.g. Leon Lindberg, "Political Integration: Definitions and Hypotheses," in B. Nelsen and A. Stubb, (eds.), *The European Union: Readings on the Theory and Practice of European Integration* (2<sup>nd</sup> ed, 1998) 145-156.

78 See e.g. A. Follesdal and S. Hix, "Why there is a democratic deficit in the EU: A Reply to Majone and Moravcsik" (2006) 44 *Journal of Common Market Studies* 533-562; S. Hix *What's Wrong with the European Union and How to Fix it* (2008).

Such a tension was in truth present from the very birth of supranationalism. Economic policies always carried significant implications, whether supportive or restrictive, for wider political projects and ambitions at the national or supranational level. Importantly, indeed, it was a powerfully supportive nexus between the economic and political which from the beginning allowed the common market to be elevated to the defining supranational priority not just on wealth-maximizing grounds. Just as important was the wider political prize of lasting peace for a continent long blighted by war that a culture of economic co-operation and shared affluence could help secure.<sup>79</sup> Less felicitous connections between the narrow economic and wider political poles of integration, however, became more evident as the EU increasingly sought market-making or market-correcting interventions involving politically salient choices, in so doing reducing the capacity of states to act independently in these policy areas. The robust juridical elaboration and protection of the single market which lay at the heart of legal constitutionalism had flourished in a formative context where market-making measures impinged only lightly on other social policy objectives, or at least where states retained the procedural means to veto politically controversial collective commitments in pursuit of these other objectives—and so were slow to make such commitments in situations where there were obvious winners and losers. But the gradual expansion of the scope of negative integration from the narrow market-making sphere and the concomitant growth of positive integration, with its shift towards a qualified majoritarian logic, decisively changed the dynamic of collective action.

The gathering danger has been that the very strength of the law in supplying “both the object and agent of integration.”<sup>80</sup>—in providing the main fruit of the ‘thin’ constitutional settlement as well as the channel for arriving at that settlement, would become a liability. On the one hand, as the *agent* of integration, the law threatened to become a medium whose prudent husbanding of the integration *acquis* would instead translate as excessive political unresponsiveness. The threat was that the legal proofing of particular agreements against political reappraisal and the prevention of new supranational initiatives except through still highly consensual and only moderately democratically inclusive procedures, or through the recondite increments of the ECJ, would become more a way of avoiding or excluding the legitimate expression of political choice and contestation and less a means of protection against free-riding or against ideologically inspired resistance or fickleness towards positive-

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<sup>79</sup> See e.g. Weiler note 6 above, ch7.

<sup>80</sup> Renaud Dehousse and Joseph Weiler, “The Legal Dimension” in W. Wallace (ed) *The Dynamics of European Integration* (1990) 242-60, 243.

sum collective commitments. On the other hand, where the pressure towards positive integration *has* lead to legal change, and as more and more controversial value choices have begun to be reflected onto the legal domain—this has also affected the ideological potency of law as the *object* of integration, stripping some of the detached, efficiency-maximizing veneer from legal supranationalism.<sup>81</sup>

#### 4. The Future of the Unresolved Constitution

The gradual fraying of the “permissive consensus”<sup>82</sup> around the idea of legal supranationalism sets the deep context within which the big ‘C’ constitutional debate emerged. Other factors contributed, notably the wave of eastward Enlargement after the fall of the Berlin Wall. The increase in the size of the EU from 15 members in 1997 to 27 in 2007 raised acute questions about the adequacy of an institutional structure initially built for a homogenous western European club of six states to a sprawling pan-European expanse of 500 million persons. Indeed, Enlargement and its unmet institutional needs provided an important rhetorical framework for the EU’s decade of reform. It was the thread that connected the busy sequence of Treaties reforms from Maastricht to Nice in 2001, whose unfinished business in turn led to the historic decision at the Laeken summit to establish a Convention on the Future of Europe.<sup>83</sup> Yet the focus on Enlargement merely channelled and accelerated a process of reflection and contestation over the kind of polity the EU was and could become that was unavoidable in light of the increasing inadequacy of the received model.

In the introduction it was suggested that three polity visions accompanied the big ‘C’ constitutional debate, and each can be seen as a response to the gradual extension of supranational capacity and competence beyond what could comfortably be accommodated in the earlier model. The truncated vision, first, was one of retrenchment. It was concerned to draw a line in the sand by resort to mechanisms such as a competence catalogue, the entrenchment of the Charter of Rights and the empowerment of national Parliaments, with constitutionalism here invoked both materially and symbolically as a limiting device to ensure against the further evacuation of state power to the supranational level.<sup>84</sup> The *sui*

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81 See e.g. Weiler note 6 above, ch.2.

82 See e.g. Lisbet Hooghe and Gary Marks “A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus” (2008) 39 *British Journal of Political Science* 1-23.

83 See e.g. Neil Walker, “Constitutionalising Enlargement, Enlarging Constitutionalism” (2003) 9 *European Law Journal* 365-85

84 Tellingly, each of these measures were central to the original post-Nice “leftovers” agenda which triggered the Laeken summit and the Convention on the Future of Europe, see Walker, n7 above

*generis* vision, secondly, was concerned with pursuing or consolidating Europe's *Sonderweg*.<sup>85</sup> Its defining priority was not the protection of state prerogatives, but ensuring against the kind of political blockage and institutional stasis which would prevent Europe from making the governance adjustments necessary for its distinctive 'post-national' accommodations between market and state, intergovernmental and supranational, legal fixity and political openness to be maintained and updated. In its pragmatic attention to the demands of a novel problem-solving context and in its non-alignment with 'old' state-sovereigntist coded oppositions, this view was the quiet motor of much of the pro-Convention movement. Constitutionalism here assumed importance less for its material content and more as way of re-energizing and re-validating a macro-political reform process which, given the progressive disappointments and deferrals of the Amsterdam and Nice Treaties, was falling foul of the law of diminishing returns.<sup>86</sup>

The mature polity vision, thirdly, hoped to bring the benefits of thick constitutionalism to bear on the Europolity. It sought that the EU constitution, through a combination of inclusive process, integrative content and culturally unifying symbolic product, could deliver some kind of functional equivalent to the peaks of comprehensive jurisdiction, self-authorization, and deeper political identity. In this way, the "asymmetry"<sup>87</sup> of a settlement in which the EU lacked the joint political resources to deliver legitimate and effective collective solutions to politically and intergovernmentally contentious issues of economic and social policy that increasingly fell outside the independent capability of national governments, might be overcome. This third vision may not have been the most commonly endorsed approach feeding the Convention momentum, but it was undoubtedly the most heavily invested in the big 'C' solution. Importantly, for the most part<sup>88</sup> it did not envisage the EU *as* a federal state, so acknowledging the concerns of the state-centred constitutionalists. It did not, in other words, seek to replace the states as the single point of final authority, original collective agency and deep political identity within the European domain. Rather, the third vision sought to develop or recognize these state-familiar constitutional assets of political community on an independent footing for the EU, and in a

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85 Weiler, n10 above.

86 See e.g. Joseph Weiler, "One the Power of the Word: Europe's Constitutional Iconography" (2005) 3 *International Journal of Constitutional Law* 173-190; B. De Witte "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process" in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law*, (2002) 39-57.

87 Scharpf, note 71 above.

88 On Europe as a federal state, see F. Mancini, "Europe: The Case for Statehood" (1998) 4 *European Law Journal* 29-42.



manner that envisaged neither superiority nor subordination to the states but engagement in a non-hierarchical relationship with them. So the EU would have a basis of authority that was autonomous without being exclusive or exhaustive. It would have a foundation and reference point of collective agency (i.e. the European people) that was distinctive and self-standing without being the only such distinctive and self-standing point of reference for the various constituencies (i.e., European states, European ‘peoples’) which made up the new collective agency. Finally, and building on the formal supranational citizenship provisions in place since Maastricht,<sup>89</sup> it would also possess a form of framing or organizing political identity, complete with rights, obligations and membership status, which was again distinctive but not unique in this function, instead operating in tandem with the other (predominantly state-centred) organizing political identities of its subjects.<sup>90</sup>

Given the disparity of visions brought to the table, it is no surprise that the big ‘C’ constitutional initiative failed. Here we see the unresolved quality of the EU Constitution in bold and sustained relief. The very conditions of competitiveness, mixity and indeterminacy that encouraged the initiative also generated the open horizon of alternatives and the intensity of disputation which invited its failure. Should this, then, lead us to conclude, especially in the light of the successful implementation of the subsequent Reform Treaty, that the idea of big ‘C’ constitutionalism in the EU is a dead letter, its resurrection neither feasible nor desirable? Whatever the future trajectory of supranational constitutionalism, ought it not now revert to some variation of the informal, small ‘c’ course around whose historical credentials and continuing contribution there has recently emerged such a clamorous overlapping consensus?

We should not draw such a hasty conclusion. The wider constitutional debate may be in abeyance, but it is not resolved and cannot be while its animating polity visions remain so deeply at odds with one another, and where the symptoms of that deep fracture in the dearth of common terms of engagement over key choices and strategic directions in both European domestic and foreign policy in the early decades of the new century remain so pertinent and

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89 See now, Arts. 20-25 TFEU.

90 See e.g. Weiler note 6 above, ch.10.

pressing.<sup>91</sup> In these circumstances, unlikely as its immediate prospects may be, a revival of the big ‘C’ Constitutional project cannot and should not be discounted.

But even if this were to happen, the sceptic might dismiss it as a futile gesture, one trapped in a self-defeating logic of contestation. There is no guarantee that the process, whatever its initial momentum, would be any more successfully negotiated next time round. And even if it were to be, this would provide no magic solution to the problems of the mutual frustration and overall dilution of collective capability in a multi-level political space which, quite differently conceived and articulated, exercise the exponents of all three visions. In particular, a successful constitutional episode would supply no compelling case in favour of the third and most optimistically positive-sum vision to those who would rather promote supranational capability in other ways (second vision) or concentrate on protecting or resurrecting national capability (first vision). For, as has been forcefully pointed out, a successful constitutional process offers no copper-bottomed guarantee of more inclusive ongoing participation, no deliberative panacea and no promise of increased support by its citizens or effective policy-making and implementation capacity even to the extent that any such participatory and deliberative dividends may be forthcoming.<sup>92</sup>

Yet the specification of a distinctive collective authorship and political identity that the constitutional self-attribution of title announces could serve another more limited but prior purpose. This concerns the realization of the very sense of collective pre-engagement in whose absence it is difficult to see how *any* attempt to reconcile polity visions in the European legal and political space, *regardless* of where and how these attempts strike the balance—can be securely grounded. For the constitutional arena—and perhaps *only* the constitutional arena, offers the possibility that, as we bring down the curtain on an era that allowed first-order economic decision-making to proceed and its benefits to accrue substantially unaffected by second-order considerations of what and who the EU stood for other than a legally demarcated set of interests delegated by the constituent states, we might at least begin the process of overcoming increasingly disabling second-order differences over the basic character of the EU polity in and through the very act of recognizing and addressing

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91 The sovereign debt crisis of 2011, and the failures of supranational policy-making in the context of the economic problems of Greece, Portugal and Ireland, is but the latest such symptom.

92 Perhaps most effectively, and most trenchantly, by A. Moravcsik, see e.g. his “What Can We Learn from the Collapse of the European Constitutional Project?” (2006) 47 *Politische Vierteljahresschrift* 2 ; K.H. Ladeur “We, the European People . . .”—Relâche? (2008) 14 *European Law Journal* , 147-67 (2008); Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010).

such differences as *our* common predicament. More specifically, such a documentary constitutional commitment may, in a boot-strapping fashion, supply the platform for the generation of a reflexive awareness of a common sense of authorship over time and for the gradual accumulation of a common constitutional experience that deepens and consolidates that common sense.<sup>93</sup>

And while it would be wrong to see this as any more than one modest element in the remaking of the European polity along lines which command broader acceptance, we should not fall in to the opposite error of underestimating its importance. A written Constitution is always both trace and catalyst. It is a trace because its very promulgation is already a sign, however modest, of the commitment and common understanding it seeks to encode. And the Constitution is also a catalyst insofar as it provides a means by which and a context in which to stimulate the deepening of that commitment and common understanding. Indeed, it is precisely this Janus-faced quality—the backward-looking recollection of common resources and gathering of existing potential just in order to solve forward-looking collective action problems amongst those of different interest, preferences and identities—that has given documentary constitutionalism its uniquely modern hue. For in its assumption that nothing is more basic or more apt than our own joint commitment to shape our common world, constitutionalism invokes a social technology unknown to pre-modern cultures. Perseverance with the techniques of documentary constitutionalism, then, may be unavoidable for anyone who wishes to maintain that the EU is best understood as a continuation by other and as yet ‘unresolved’ means of political modernity’s defining project of the collective reconciliation of freedom and equality, rather than a venture into a wholly uncharted political imaginary.

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93 See, e.g., J. Habermas, On Law and Disagreement: Some Comments on “Interpretative Pluralism,” (2003) 16 *Ratio Juris* 187-199.

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